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Implementation of akad tahkim in sharia arbitration mechanism by Basyarnas-MUI

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Abstract: Sharia arbitration as an alternative to sharia economic dispute resolution is still considered ineffective. In fact, when referring to the term "sharia" attached to sharia arbitration and Basyarnas-MUI, this institution should be a solution in accordance with the principles of Islamic law. This research aims to analyze the procedures and mechanisms of sharia arbitration by Basyarnas-MUI as well as the implementation of tahkim contracts in its implementation. This research uses a qualitative method with a literature study approach and a descriptive-analytical method based on the theory of tahkim contracts. The results show that there are six stages in the mechanism of sharia arbitration by Basyarnas, namely: (1) application registration, (2) arbitrator determination, (3) examination and trial process, (4) peace mediation, (5) decision making, and (6) execution and annulment of the decision. This study found that the implementation of the tahkim contract by Basyarnas has been carried out in principle, but not fully maximized, especially in the aspects of arbitrator competence and the validity of the object of dispute. Therefore, it can be concluded that the implementation of the tahkim contract in the sharia arbitration mechanism by Basyarnas-MUI still requires strengthening so that it can run in accordance with the principles of Islamic law and become an effective solution in resolving sharia economic disputes.
Keywords: Basyarnas MUI, Implementation of tahkim contract & Mechanism of sharia arbitration.

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Introduction

Historically, Basyarnas has shown progress in dispute resolution, with 23 cases resolved at the central level by 2015, and continues to expand its reach with more than 20 representative offices in various provinces to facilitate access for business actors (Sinayang, 2023). During its 32 years of existence, Basyarnas (National Sharia Arbitration Board) MUI has not been optimal in handling the settlement of sharia economic disputes. Some Basyarnas decisions have not been able to satisfy one of the two parties in dispute, such as Putusan Badan Arbitrase Syariah Nasional (Basyarnas) Nomor 16/Tahun 2008/BASYARNAS/Ka.Jak (Tsauri, 2014) and Putusan Basyarnas-MUI Jawa Timur Nomor 02/Basyarnas-Jtm/2022 (NISFU AMALIA, 2024), in which both decisions were submitted to litigation for cancellation. In addition to these two decisions, there are also cases related to dissatisfaction with Basyarnas, namely the case of Pertamina, which applied for financing in the murabahah (sale and purchase) scheme to the two Islamic banks to finance the procurement of 100 vehicles, but there was a dispute between the two so that Pertamina wanted to submit the dispute resolution to Basyarnas but Basyarnas never did it.

The first two phenomena above are potentially undermines to the final and binding nature of sharia arbitration decisions (Khasanah, 2018) because there are still legal remedies to cancel the

Basyarnas decision. In addition, one of the objectives of the establishment of Basyarnas is to reduce the settlement of sharia economic disputes through litigation (Saprudin, 2024). However, in fact, it has not been implemented optimally because one of the two parties feels dissatisfied and then submits an application to cancel the Basyarnas decision to the Religious Court. In fact, this has actually increased the workload of the Religious Court (Hayatunnufus, 2023).

The third phenomenon also makes Sharia arbitration, which was originally an option for dispute resolution, become an obstacle. This is because the requirement for Sharia arbitration to take place is the agreement of both parties to carry it out. Therefore, if one party does not agree to resolve the dispute through Sharia arbitration, the Sharia arbitration process cannot proceed. This third phenomenon can ultimately result in losses for one party, specifically material losses regarding what was agreed upon in the previous cooperation agreement.

Sharia arbitration in Indonesia, which is conducted by Basyarnas, continues to undergo evaluation, development and discussion by academics (BASYARNAS-MUI, 2025). Although sharia arbitration was established in 1993, its legal basis was only formalised in Undang-undang No. 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa, although specifically, the word "sharia arbitration" is not mentioned in it (Undang-undang RI, 2008).

The word "sharia arbitration" began to be specifically mentioned in Indonesia's legal foundation in Penjelasan Undang-undang No. 21 Tahun 2008 Tentang Perbankan Syariah Pasal 55 Ayat 2 (Undang-undang RI, 2008)Indonesia. However, the Law and SEMA No. 8 of 2008 actually caused a polemic that was hot in the sharia arbitration discourse, namely the dualism of the authority to arbitrate sharia economic disputes and the execution of sharia arbitration awards between the District Court and the Religious Court. Thus, in order to prevent this ambiguity, the Constitutional Court through Decision No. 93/PUU-X/2012 determined that the Religious Court has the authority to resolve sharia economic disputes, including the execution of sharia arbitration awards.

Since Basyarnas was established, sharia arbitration has become a topic that continues to be discussed, especially among academics. Periodically, the theme of sharia arbitration as an object of research or object of discussion is divided into four phases. The first phase is the discussion on the establishment of sharia arbitration institution (BASYARNAS-MUI, 2025). The second phase, discussion and research related to the legal basis of sharia arbitration and the position of Basyarnas MUI. The third phase, discussion and research related to the effectiveness of sharia arbitration and the role of Basyarnas MUI. The fourth phase, research and discussion on the competence of sharia arbitrators and Basyarnas MUI.

If we observe all studies with the broad theme of sharia arbitration and Basyarnas MUI and their additional variables using literature reviews from Google Scholar and Publish or Perish, there are five studies related to the effectiveness of sharia arbitration as a means of resolving sharia economic disputes. Rosidah and Mahfiana state that sharia principles have not been effectively and maximally applied by Basyarnas (Rosidah & Mahfiana, 2020). Yunita, with her research focus in the Special Region of Yogyakarta, concludes that dispute resolution through Basyarnas DIY is carried out effectively and efficiently (Yunita, 2021). Fitriyah and Soviana opine that Islamic arbitration in Indonesia is considered quite effective in resolving Islamic business disputes (Fitriyah & Soviana, 2021). Romlah, who compared the resolution of Islamic economic disputes in religious courts related to arbitration and bankruptcy, stated that only dispute resolution related to arbitration is effective, while that related to bankruptcy has not been effective (Romlah, 2023). A recent study by Harahap and Khoirudin in 2024 concluded that the resolution of sharia economic disputes through sharia arbitration is not yet effective (Harahap & Khoirudin, 2024).

With the results of recent research that the settlement of sharia economic disputes through sharia arbitration has not been effective, the author is interested in examining one of the factors that may be the cause. That factor is the realisation of the implementation of *tahkim* contract in sharia arbitration

mechanism or not by Basyarnas MUI. Also, if considering the word sharia from sharia arbitration and Basyarnas MUI, it should be a solution and able to present as an alternative dispute resolution, in accordance with the principles of Islamic law. However, the results of research by Rosidah et al. said that the application of sharia principles in sharia arbitration by Basyarnas MUI has not been effective (Rosidah & Mahfiana, 2020).

Therefore, with regard to the aforementioned research issues and gaps, the author will examine the procedures and mechanisms of Sharia arbitration by Basyarnas MUI and the implementation of tahkim contracts in the practice of Sharia arbitration. The author hopes that the results of this research will contribute academically to the future development of Sharia arbitration. This research is necessary to clarify the facts regarding the practice of sharia arbitration by Basyarnas-MUI, which should use the tahkim agreement as a guideline for arbitration practices. Additionally, the term 'sharia' in sharia arbitration needs to be strengthened by testing the compliance of its mechanisms with the tahkim agreement so that Muslim entrepreneurs, and even non-Muslims, are interested in resolving disputes through sharia arbitration by Basyarnas-MUI.

Method

This research is a qualitative study using literature review. Data will be collected using literature observation techniques from journal articles, classical fiqh books, sharia arbitration decisions, the official Basyarnas website, and legislation. The primary data in this study are sharia arbitration decisions, the official Basyarnas website, and classical fiqh books, while secondary data are obtained from journal articles related to arbitration in Islam, arbitration practices, and legislation. The data obtained will then be analysed, starting with the sharia arbitration mechanism by Basyarnas-MUI, followed by the tahkim contract mechanism in classical fiqh, and finally a descriptive comparison of the compliance of the sharia arbitration mechanism by Basyarnas-MUI with the tahkim contract one by one using the tahkim contract theory explained in classical fiqh books. Therefore, the method used is a descriptive analysis method with an arbitration contract theory approach. The arbitration contract approach in this study will formulate the pillars of the arbitration contract, then use these pillars as a benchmark for sharia compliance in the sharia arbitration mechanism by Basyarnas-MUI.

Results and Discussion

Sharia Arbitration and the National Sharia Arbitration Board (Basyarnas)

Arbitration in Islam has been known for a long time, but under the name tahkim. This discussion has also been studied in classical fikih as well as several interpretations of the Qur'an and hadith that explain tahkim. The validity of arbitration or tahkim in Islam has been strengthened by several arguments from the Qur'an and hadith, such as QS. An-Nisa verse 35, QS Al-Maidah verse 95, the hadith narrated by an-Nasai about Abu Shuraih and the hadith narrated by al-Bukhari and Muslim about Sa'd bin Mu'adz. A complete explanation of the tahkim contract will be discussed in the next chapter.

In Indonesia, sharia arbitration was initiated in 1992, precisely at the National Working Meeting (Rakernas) of the Indonesian Ulama Council (MUI) in 1992 which gave rise to the idea of establishing a sharia arbitration body. This was fuelled by the establishment of Bank Muamalat Indonesia (BMI) and profit-sharing practices by Sharia Rural Banks (BPRS) in the same year, which marked the development of sharia economy in Indonesia. For a year, MUI continued to discuss and prepare the establishment of a sharia arbitration body and formed a special working group on this matter. So that on 21 October 1993, the Deed of Establishment of the National Sharia Arbitration Board (BAMUI), was officially implemented. (BASYARNAS-MUI, 2025)

Since its inauguration in 1993, Basyarnas has spread throughout Indonesia, precisely in 20 provinces. This institution was previously named Bamui (Indonesian Muamalat Arbitration Board)

which was later changed to Basyarnas MUI based on SK MUI No. Kep-09/MUI/XII/2003. Basyarnas has two main authorities; the first is to resolve sharia/civil economic disputes and the second is to provide binding legal opinions at the request of the parties. This is reflected in the main vision of Basyarnas, which is to become an independent, professional, credible and accountable institution for resolving sharia economic disputes outside the courts (BASYARNAS-MUI, 2025).

The principle of confidentiality and closed hearings in the process of implementing sharia arbitration ultimately makes access to its decisions fairly difficult. Therefore, the author only found two sources that mention the number of sharia arbitration decisions by Basyarnas. The first source states that the number of sharia arbitration decisions in the span of 1997-2009 was 17 decisions. (Harahap & Khoirudin, 2024) The second source suggests that there are nine cases decided through sharia arbitration by Basyarnas. (Kurniawati, 2020) With these two decisions, in fact the number of sharia arbitration decisions by Basyarnas MUI is still relatively small.

As the process of sharia arbitration by Basyarnas MUI continues to this day, some of the legal bases on which it is based are as follows (BASYARNAS-MUI, 2025):

1. Undang-Undang Nomor 30 tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa
2. Undang-Undang Republik Indonesia Nomor 21 Tahun 2008 Tentang Perbankan Syariah
3. Peraturan Bank Indonesia Nomor: 9/19/PBI/2007 Tentang Pelaksanaan Prinsip Syariah Dalam Kegiatan Penghimpunan Dana Dan Penyaluran Dana Serta Pelayanan Jasa Bank Syariah
4. Peraturan Mahkamah Agung Republik Indonesia Nomor 14 Tahun 2016 Tentang Tata Cara Penyelesaian Perkara Ekonomi Syariah
5. Peraturan Mahkamah Agung Nomor 03 Tahun 2023 tentang Tata Cara Penunjukan Arbiter oleh Pengadilan, Hak Ingkar, Pemeriksaan Permohonan Pelaksanaan dan Pembatalan Putusan Arbitrase
6. SK Dewan Pimpinan MUI No. Kep-09/MUI/XII/2003 tentang Badan Arbitrase Syariah Nasional
7. Peraturan Badan Arbitrase Syariah Nasional-Majelis Ulama Indonesia (BASYARNAS-MUI) Nomor: PER-01/ BASYARNAS-MUI/XI/2021 Tentang Tata Cara Penyelesaian Sengketa Ekonomi Syariah Di Badan Arbitrase Syariah Nasional-Majelis Ulama Indonesia (BASYARNAS-MUI)
8. Kode Etik Arbiter Basyarnas-MUI

Sharia Arbitration Mechanism by the National Sharia Arbitration Board of the Indonesian Council of Ulama (Basyarnas-MUI)

Basyarnas MUI has the responsibility to settle cases in a fair and more efficient manner, especially in disputes related to muamalah or civil matters. This includes various fields such as trade, finance, industry, services, and others, where all applicable legal provisions and regulations are governed by law and fully controlled by the parties involved in the dispute with the existence of a dispute resolution agreement clause through sharia arbitration in the agreement of both parties. (Tehedi, 2023)

In order to support its responsibility, Basyarnas MUI establishes the mechanism of sharia arbitration that it conducts, along with an explanation of its stages (BASYARNAS-MUI, 2025; Tehedi, 2023):

1. Application registration

   The arbitration process begins with the filing of a request for arbitration with Basyarnas. The request should include important information such as the full identity and addresses of the parties involved in the dispute, a summary of the case, the claims sought, and the arbitration clause agreed by the parties. In addition to the request letter itself, the requesting party is required to attach a copy of the contract underlying the dispute, other relevant documents, and pay the prescribed administrative fee.
2. Arbitrator determination

After the application letter is received, Basyarnas will check the completeness of the documents and the parties' agreement deed, especially the dispute settlement article which contains that in the event of a dispute, the parties choose a non-litigation route, namely sharia arbitration through Basyarnas. Then, the chairperson of Basyarnas will immediately appoint a sole arbitrator or a panel of arbitrators based on the existing agreement, and will give notice to the relevant parties of the appointment. The Basyarnas sharia arbitrators who have been prepared to resolve sharia economic disputes certainly have special competencies, here are their competencies: Capable of taking legal action, at least 35 years old, not be related by blood or consanguinity up to the second degree to either party to the dispute, have no financial or other interest in the decision, at least 15 years of experience and active mastery in the field, not working as a judge, prosecutor, registrar and other judicial officials, devout muslim, mastering sharia law which is his competence.

3. Examination and trial proceedings

   Once an arbitrator has been appointed, the arbitrator will notify the respondent of the dispute and request a response. Upon receipt of the respondent's response, a copy of the response is served on the claimant. The arbitrator then sets a hearing time for both parties to attend (maximum 14 days after the order is issued) to present evidence and call witnesses from both parties. This process is conducted in private to maintain the confidentiality of the information. If the respondent does not respond within 30 days, the arbitrator will summon both parties as required. The hearing will be closed once it is deemed sufficient, and the day for the announcement of the final award will be set.

4. Mediation for peace

   On the day of the hearing, the arbitrator will endeavour to resolve the dispute through mediation first. If the mediation reaches an agreement, a peace deed will be drafted and registered to give it legal force.

5. Decision making

   Upon completion of the hearing, the arbitrator will issue a final and binding decision for all parties involved in the dispute and Basyarnas will then register the decision with the Religious Court in the area of domicile of the respondent.

6. Execution of judgement and cancellation

   If one party does not implement the judgement voluntarily, the prevailing party has the right to seek execution of the judgement through the court. In addition, the aggrieved party can also file a petition to annul the judgement within a certain period of time, with reasons specified by existing regulations.

Akad Tahkim in Classical Fikih and AAOIFI

In classical fikih, the form of arbitration in Islam is known as *tahkim* contract. The definition of *tahkim* (sharia arbitration) agreed upon by the jurists of the four madhhabs is:

تولية الخصمين حاكما يحكم بينهما

"The granting of authority by the two parties to a dispute to a *hakam* (sharia arbitrator) to decide the case disputed by the two parties". (Ubaidullāh, 2023), Az-Zarqa added from the definition:

وهو عقد بين طرفين متنازعين يجعلان فيه برضاهما شخصا آخر حاكما بينهما لفصل خصومتهما، وقد يكون بين أكثر من طرفين

"That the arbitrator appointed is a substitute for a court judge, so this makes it clear that *tahkim* is different and outside the judiciary".

A longer definition is explained by Khalid that *tahkim* (sharia arbitration) is a contract (agreement) that authorises a *hakam* (sharia arbitrator) to decide the case of the disputing parties with the agreement of the two disputing parties to submit the decision to a *hakam* (sharia arbitrator), and the results of this *tahkim* (sharia arbitration) have the power of legal certainty (Sulaimān, 2023). In the author's opinion, this definition comprehensively explains this contemporary sharia arbitration. Apart

from the definition, an important element in a contract is the pillars of the contract itself. From the four references that the author referred to earlier, there are three pillars in general and five pillars specifically. The following are the pillars and their detailed explanations (Sulaimān, 2023; Ubaidullāh, 2023):

1. *Muhakkim* (parties to the dispute)

   The parties to the dispute are the two or more disputing parties who agree to submit their dispute to an arbitrator (in this case, Basyarnas). These two or more parties may be individuals, institutions or both. The requirement for the two or more parties to the dispute is that they are qualified and competent to perform the contract in accordance with Shari'ah.
2. *Muhakkam* (sharia arbitrator)

   It can also be called hakam, which is someone who is asked to mediate the case of the parties to the dispute. This *Muhakkam* (sharia arbitrator) can be a single person or more than one, as well as an institution, such as Basyarnas. The requirements for the *muhakkam* / *hakam* (sharia arbitrator) are not to have kinship ties or hostility to one of the parties to the dispute, also a *muhakkam* / *hakam* (sharia arbitrator) must be competent and qualified in ijtihad and judging like a judge, or it can also be enough to refer to someone who is able to do ijtihad.
3. Ma'qud 'alaih (disputed matter)

   The purpose of this pillar is the object of tahkim that is disputed by the parties. Therefore, a *muhakkam*/*hakam* (sharia arbitrator) should not bother to deal with disputes that are not under his authority. This requires that the object of *tahkim* (sharia arbitration) be certain, known and certain.
4. *'Iwadh* (service fee)

   This service fee is a right for the *muhakkam*/*hakam* (sharia arbitrator) for his hard work in resolving the disputing parties' cases. Whether the fee is material or not, it can be paid by the disputing parties or by another party. However, the *muhakkam*/*hakam* (sharia arbitrator) can also waive the fee for his services and *tahkim* (sharia arbitration) free of charge for the disputing parties. If the *muhakkam*/*hakam* (sharia arbitrator) charges a fee, then this fee must be certain, known and certainly permissible in sharia.
5. *Sighah* (Ijab and Kabul)

   This *sighah* or ijab and kabul is an expression of the willingness of the *muhakkam*/*hakam* (sharia arbitrator) to carry out *tahkim* (sharia arbitration) and the agreement of the parties to the dispute to submit their dispute. This expression can take the form of speech, writing or gesture.

AAOIFI or Accounting and Auditing Organization for Islamic Financial Institutions is an international organisation that develops and publishes Islamic accounting and auditing standards for Islamic financial institutions. As an international organisation, AAOIFI has many standards of sharia guidelines in the world of Islamic finance called Sharia Standard and contains 58 standards of sharia guidelines. Sharia Standard often becomes a reference for Islamic countries around the world as a form of dynamic development of contemporary fikih that follows the times, including in terms of arbitration which is sharia standard number 32. (Accounting and Auditing Organization for Islamic Financial Institutions, 2017)

In sharia guideline standard number 32 concerning arbitration also explains the definition, pillars and several other matters related to sharia arbitration. If you look at the definition and pillars of the tahkim contract in classical fikih and sharia arbitration, there are no significant differences, except in one thing, namely the competence of a *hakam*/*muhakkam* (sharia arbitrator). The competence of a *hakam*/*muhakkam* (sharia arbitrator) in classical fikih requires a person who is capable of ijtihad and has the competence of a judicial judge, or it is sufficient to refer to a mujtahid (Accounting and Auditing Organization for Islamic Financial Institutions, 2017).

In contrast to that, in Sharia Standard number 32 concerning sharia arbitration, the requirement for an arbitrator is the ability to perform legal actions, without specification to Islamic law. The requirements in sharia standard number 3 on sharia arbitration are quite loose, because in addition to the

requirements that the author mentioned, a sharia arbitrator is also allowed from non-Muslims if forced by an emergency (Accounting and Auditing Organization for Islamic Financial Institutions, 2017).

Analysis of the Implementation of Akad Tahkim in Sharia Arbitration Mechanism by Basyarnas-MUI

In the Surat Keputusan Dewan Pimpinan Majelis Ulama Indonesia No.Kep-09/MUI/XII/2003 dated 30 Syawal 1424 (24 December 2003) concerning the National Sharia Arbitration Board, Article 1 states that Basyarnas is a *hakam* institution (sharia arbitration). (With this decree, it can be understood that the practice of sharia arbitration is another name for the practice of *tahkim* contracts in classical fikih. Likewise, Sharia Standard number 32 defines *tahkim* with arbitrarion (Accounting and Auditing Organization for Islamic Financial Institutions, 2017).

With these two facts, the practice of sharia arbitration in Indonesia is based on the *tahkim* contract. However, the author will analyse the form of implementation of the *tahkim* contract in the process of sharia arbitration by Basyarnas in terms of its implementation mechanism and procedures. Looking at the mechanism of sharia arbitration by Basyarnas and the explanation of the legal pillars and conditions of the *tahkim* contract, both of which the author has explained previously, in this sub-chapter, the author will examine the mechanism of implementation of arbitration by analysing it from the fulfilment of the pillars and conditions of the contract.

First, the *muhakkim* (parties to the dispute), this first pillar and its conditions have been implemented in the first stage, namely the requirement to include personal files in the form of complete identity and address of the parties involved in the dispute as well as the sharia arbitration dispute resolution clause by Basyarnas and agreed by the parties. Therefore, with these required documents, the first pillar of the *tahkim* contract and its conditions have been fulfilled. Second, *muhakkam* (sharia arbitrator), this second pillar is very clearly located in the second stage of the sharia arbitration mechanism, namely the determination of the arbitrator. The competence of the Basyarnas sharia arbitrators mentioned earlier is partly in accordance with the requirements of the *muhakkam*/*hakam*, but some others are not, such as the ability to exercise jurisprudence and judgement. In contrast to classical fikih, AAOIFI with its Sharia Standard as one of the contemporary fikih guidelines does not require proficiency in jurisprudence and judgement, but only requires proficiency in performing legal actions. Although the competence of Basyarnas' sharia arbitrators does not require proficiency in ijtihad and judgement as in classical fikih, Basyarnas still requires mastery of sharia law for sharia arbitrators. Therefore, the competency requirements set by Basyarnas are a form of implementation of the second pillar of the *tahkim* contract. Despite the fact, there are cases of Basyarnas sharia arbitration decisions that are problematic, such as the consideration of decisions that do not look at the contracts made by the two parties to the dispute (Faizun, 2021), as well as the negligence of arbitrators in the decision of the National Sharia Arbitration Board (Basyarnas) Nomor 16/Tahun 2008/BASYARNAS/Ka.Jak.

Third, *ma'qud 'alaih* (the matter in dispute). The requirements of this pillar, namely that it must be certain, known and certainly permissible in sharia to be used as the object of tahkim contracts, have been implemented in the first stage, namely the submission of the contract clauses of the parties to the dispute and their checking by Basyarnas. However, there are cases where the disputed contract is in fact not sharia valid but is passed in the implementation of sharia arbitration (Faizun, 2021).

Meanwhile, the fourth pillar, *'iwadh* (service fee) and the fifth, *sighah* (ijab and kabul) have been carried out and implemented at the first stage, namely registration of the application. This is because at this first stage, the *muhakkim* (party in dispute) will deposit a letter of request for sharia arbitration to Basyarnas which if Basyarnas accepts it, then this has become the ijab kabul of the two parties in writing. Also at this stage, the *muhakkim* (disputing party) will make an initial payment, then this payment becomes a form of service fee that has been determined and known.

Conclusion

In the implementation of the sharia arbitration process by Basyarnas MUI, there are at least seven stages in the sharia arbitration mechanism from start to finish. The seven stages are, first, the registration of the application, then the determination of the arbitrator, then the examination and trial, after which mediation for peace, decision making and ending with the execution of the decision and cancellation. Sharia arbitration as a form of *tahkim* contract explained by classical fukaha has in fact been implemented in principle in sharia arbitration by the National Sharia Arbitration Board (Basyarnas), but in reality there are still mistakes in taking a stance, both from the arbitrators themselves and their administrative staff.

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